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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 608.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MICHAEL DUPLAK, by his next friend, Steve Duplack, and STEVE DUPLACK and ANNIE DUPLACK, individuals,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

FREDERIC B. SCOTT AND
FEDER & RINZLER,
Counsel for Respondents.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

Statement of the Case.

Several facts omitted or inaccurately stated in the "Statement" in the Petitioner's brief will be found under Point II of the "Argument" of Respondents' brief.

ARGUMENT.

I.

Section 55 of the New Jersey statute concerning railroads is inapplicable.

Counsel for the petitioner in his brief succinctly presents the question which is the crux of the instant case, when he says,

> "We submit that an invitation implied from custom (even if there was such an invitation) cannot change the effect of the statute, and that a verdict should have been directed in favor of the petitioner."

because, if it be held by this court that such is the law, it is conceded that it would be dispositive of the other two assignments of error, to wit, the trial court's alleged erroneous instruction to the jury that the bridge where the accident happened was an attractive nuisance—which assignment of error, however, was not argued on the brief, and appears to have been abandoned—and that "There was no evidence of negligence on the part of the employees of the petitioner".

The interpretation which this court has given to Section 55 of the Railroad Act of New Jersey, in the case of *Erie R. R. Co.* v. *Hilt,* 247 U. S. 97, 62 L. Ed. 1003, that "the statute seemingly adopts in an unqualified form the policy of law as understood in New Jersey, * * * that while a landowner cannot intentionally injure or lay traps for a per-

son coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there", does not change the rule of law that there still would be a basis of liability in the case of intentional or wanton injury, and therefor necessitates an examination of the question as to whether the landowner—railroad company—can waive a right given it or impressed upon its property by a legislative act merely declaratory of the common law or whether it can waive or be estopped from asserting that right.

By analogy, there would seem to be but an affirmative answer to the question; that the landowner can waive the right so given it by the statute.

It has been held by this court that one may waive his rights with respect to both his life and liberty—*Alexander* v. *United States,* 137 U. S. 353-360, in which case Alexander, on trial for murder, waived his rights to object to the jury impanelled to try him, given him by the Federal statutes, he having silently sat by without asserting his right to challenge the jury. His subsequent attempt to invoke his statutory right was held to have been lost or waived by his silent acquiescence in the first instance.

See also *State of New Hampshire* v. *Almy,* 22 L. R. A. (anno.) 744-750.

In *Bank of Columbia* v. *Okely,* 4 Wheat. 235, 4 L. Ed. 559, it appeared that an act of the Assembly of Maryland, incorporating the Bank of Colum-

bia, gave to the bank a summary process by execution, in the nature of attachment, against its debtors who had, by express consent, in writing, made bonds or notes, by them drawn or indorsed, negotiable at the bank. There this court held that the maker of such instruments had by his acts voluntarily relinquished his claim to the ordinary administration of justice.

The expression by this court in the case just cited—*relinquishment of private rights*— is analogous to the method by which we contend the present petitioner has waived the benefits of the statute upon which it now seeks to rely.

Similarly, the statute of limitations may be waived by failing to specially plead the statute as a defense at the proper time. *Gormley v. Bunyan*, 138 U. S. 623-635, 34 L. Ed. 1086.

There is thus indicated by the foregoing cases two methods by which one can waive his rights given by statute, the *Bank of Columbia* case, *supra*, waiver by express adoption, and the *Alexander* case, *supra*, and the *Gormley* case, *supra*, by acquiescence or disregard.

The evidence in the instant case shows a complete waiver of the petitioner, by acquiescence, of the benefit of the statute in question, leaving the land of the railroad company affected and impressed with the doctrine of attractive nuisance, recognized and enforced in the Third Judicial District, in which the case was tried.

This doctrine, the petitioner's attorney recognized, was applicable to the instant case if the statute in question did not preclude it, and the trial court applied the doctrine as controlling. To

the application of which doctrine by the court, the petitioner, although assigning error thereon, has abandoned it as a ground for reversal.

Much reliance, we believe, will be placed by counsel for petitioner on the case of *Erie R. R. Co.* v. *Hilt, supra,* but an examination of that case shows, in the language of this court's opinion, that in that case "there is no ground for argument that the plaintiff was invited upon the tracks". In the instant case, however, counsel for petitioner admitted that the evidence showed "that children have played there from time to time during twenty years * * * I don't expect to question that evidence" (R. 23).

The instant case is further differentiated from the *Hilt* case, *supra,* in that in the *Hilt* case this court stated that "it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away", for the instant case shows that the only instance when children would be ordered away from playing on the bridge and the railroad tracks was when the petitioner desired to move trains over its bridge, in which instance the trainmen "would come on the bridge and clear the track" (R. 42).

The instant case, factually, is much more analogous to the case of *Sioux City & P. R. R. Co.* v. *Stout,* 84 U. S., 657, 21 L. Ed. 745, the well-known case of a boy injured on a turn-table, than the more recent case of *United Zinc & Chemical Co.* v. *Britt,* 258 U. S. 267-280, 66 L. 615, for in the *Stout* case,

supra, it appeared that children had played on the turn-table before to the knowledge of the employees of the railroad, and that the turn-table was near a public road, without visible separation (such as the bridge in the instant case, which connected one public street with another), while in the *Britt* case, *supra*, it was held that there appeared to be no evidence that the water pool in which the child was injured and which was some 100 to 200 feet from a travelled way on which the child was, could not be seen; affecting somewhat the question that the sight of the pool was what led the infant to enter upon the chemical company's land.

The *Stout* case, *supra*, being controlling, the Circuit Court of Appeals was correct in applying the cases of *Snare* v. *Friedman*, 169 Fed. 1, and *Public Service Railway Co.* v. *Wursthorn*, 278 Fed. 408, they both being based on the doctrine of the *Stout* case, *supra*.

Reliance is placed by the petitioner on the case of *Barcolini* v. *Atlantic City etc. R. Co.* 82 N. J. Law, 107, dealing with the question of the railroad act herein involved, wherein a twenty-one months' old child was injured. An examination of that case shows that the question of invitation was in no way involved and that the length to which it went in its decision, was that the statute "in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned" (the instant case being no way analogous), "and applies to all persons alike, without distinction as to their age or physical or mental condition".

A more recent decision, however, *Rhodehouse* v.

Director General of Railroads, 95 N. J. Law, 355, dealing with the identical statute and wherein the question of invitation was directly involved, held the statute inapplicable and that a jury question was presented.

A somewhat analogous statute to the statute here involved, in the State of New York reads, in part, as follows:

> "No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same."

This statute has been construed to be inapplicable in a situation where for a number of years the public, with the acquiescence and permission or consent of the railroad company, has been accustomed to cross railroad tracks at a point other than a street crossing, and the railroad has been held bound to exercise reasonable care to protect a person crossing at that point from injury.

Lamphear v. *New York Cent. R. Co.*, 194 N. Y. 172.

II.

There was sufficient evidence of negligence on the part of petitioner's employees to require the submission of the case to the jury.

An inspection of several of the exhibits in the instant case makes for clarity the questions involved. Respondents' map-exhibit P-3 (R. 137) shows the bridge in question upon which the infant respondent was injured, as crossing the Dundee Canal carrying the Railroad Company's track from First Street to Passaic Street in Passaic. Exhibits P-1, P-2, (135-136), D-1 and D-2 (139-140) and D-5 (R. 143) show the planked foot-way over said bridge which had been in common use by the public for over some twenty years (R. 12, 13). Exhibit P-4 (R. 138) shows the structural character of the spring boards attached to the bridge without let or hindrance from the petitioner, from which children dove when swimming in the canal (R. 74).

For over a period of twenty years, the boys used to play upon the bridge, run on the railroad tracks and ties, play with the water by leaning over from the bridge, stand on the spring board, and in the winter when the water was frozen they used to go skating on the bridge and when there was a skim of ice they moved up and down and across the canal, and would get under the cross members of the bridge, break and fish right through the ice and catch killies in the water (R. 14, 15, 18, 19, 22, 23, 24, 55, 61, 62).

Petitioner admitted that children habitually played on the bridge (R. 3) from time to time during a period of twenty years.

Petitioner concedes that it had established a custom of giving certain signals or warning before moving a train on the bridge, and that a member of the crew used to come on the bridge and clear it before a train would move upon it. Petitioner admits, however, that on the occasion of this accident, none of these customary signals or warnings were given—no member of the crew came on the track to clear it, or give any warning.

The failure to give any of these customary signals or warnings, and the failure to clear the bridge as it had been the custom of petitioner's employees to do, is important in view of the fact that the public used to cross this bridge which connected two public streets, and children used to use it as a playground (R. 22). Under these circumstances, it was the duty of petitioner's employees to exercise reasonable care to protect these children from injury.

Counsel for the petitioner argues that the boy was concealed under one of the freight cars and could not be seen. His error is demonstrated by the testimony of Chanowetz, who saw the boy playing on the bridge, leaning over as if he was dropping something or doing something in the water (R. 30). At the trial, Chanowetz was asked to step down from the witness stand and show the court and jury the position that the boy was in, and he actually demonstrated to the court and jury the boy's position upon the bridge (R. 30). In order that the record

would show what the witness was demonstrating, counsel for the respondent remarked "The witness indicated—may I state for the record—that he was resting on his right knee as if looking down into the water, doing something, or playing with the water, and his left leg extended out further than the right. Have I correctly put it?" To which, counsel for the petitioner replied "Yes, sir." (R. 30).

When Chanowetz saw the boy, the train was still sixty or sixty-five feet away. He hollered "stop, stop," but the train did not stop until after it ran over and amputated the boy's leg (R. 31).

Petitioner concedes that none of its crew saw the boy, but this is no doubt due to their failure to look. If the petitioner's crew had given the customary relay signals or had come upon the bridge to clear it as they had been accustomed to do at other times before moving the train, they would not have only seen the boy on the bridge, but they would have avoided running over him.

The case was tried on the theory that this bridge was from its very appearance and construction an attractive nuisance to children and that the turntable doctrine applied. Petitioner, in his brief, does not argue to the contrary and we presume, therefore, that petitioner concedes that this doctrine was properly applied to the case, if the statute does not preclude its application.

The boy was at play on the bridge on this occasion. That many children had been at play on this bridge on other occasions, within the observation and knowledge of the employees of the petitioner, who, if they had looked, would have seen the boy

on this occasion, is evidence from which the jury was justified in believing that children would probably resort to it, and that the petitioner should have anticipated that such would have been the case.

The Sioux City and Pacific Railroad Company v. *Stout*, 17 Wall., 657-665, 21 Law. Ed., 745, decided by this court.

In that case, this court also stated:

> "In the well known case of Lynch v. Nurdin, 1 Ad. & El. N. S. 29, the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.
>
> In Birge v. Gardiner, 19 Conn. 507, the same judgment was given and the same principle was laid down. In most of the actions, indeed, brought to recover for injuries to children, the position of the child has been that of a technical trespasser.
>
> In Daly v. R. Co., 26 Conn. 591, it is said: the fact that the person was trespassing at the time is no excuse, unless he thereby invited the act or his negligent conduct contributed to it.
>
> In Bird v. Holbrook, 4 Bing. 628, the plaintiff was injured by the spring guns set in the defendant's grounds, and although the plaintiff was a trespasser the defendant was held liable (citing authorities)".

Petitioner argues that the evidence as to its negligence was so insubstantial and insufficient that it did not justify the trial court in submitting that issue to the jury, yet the record shows that it was so substantial that it required the trial court to submit the issue to the jury.

In *Sioux City and Pacific Railroad Company* v. *Stout, supra*, this court said:

> "In Redfield on the Law of Railways (2d vol., p. 231), it is said: 'And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury (citing cases)' ".

The case of *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, cited by the petitioner applies only where there is a mere scintilla of evidence. Where, however, the issues depend upon the credibility of witnesses, and the effect or weight of the evidence, they are to be determined by the jury. It is only "where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury." *Gunning* v. *Cooley*, 281 U. S. 90-98; 74 L. Ed. 720.

In the instant case there is positive or substantial evidence of negligence which presented an issue of fact to be submitted to the jury.

We respectfully submit that the judgment should be affirmed.

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Counsel for Respondents.